

**Overstreet, Greg (ATG)**

---

**From:** mbindas@ij.org  
**Sent:** Wednesday, January 11, 2006 5:29 PM  
**To:** Overstreet, Greg (ATG)  
**Subject:** Public Record Comments

The following message was submitted to the Office of Attorney General:

**From:** Bindas, Michael  
**Email Address:** mbindas@ij.org  
**Organization:** Institute for Justice - Washington Chapter  
**Address:** 811 First Avenue  
 Seattle WA 98104  
**Phone:** (206) 341-9300(Work)

**Comments:**

INTRODUCTION With some modifications suggested below, Institute for Justice Washington Chapter (IJ-WA) encourages adoption of the proposed model rules and comments concerning the Public Records Act and lauds the Attorney General and his staff for this important effort. Adoption of these rules will better enable the people of Washington to remain informed and thereby maintain control over the instruments of government they have created. IJ-WA, however, urges the Office of the Attorney General to make certain revisions that will more effectively advance the purposes of the Public Records Act.

WITHHOLDING INDEX/LOG Proposed rule WAC 44-14-040(5) requires an agency withholding a public record to "state the specific exemption and provide a brief explanation of why the record is being withheld." It further requires an agency redacting a portion of a public record to "provide the remaining portions . . . and indicate to the requestor why portions of the record are being redacted." Similarly, the corresponding proposed comment, WAC 44-14-05004(4)(b)(ii), provides: "When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld." (Emphasis added.) Regarding the required "brief explanation," proposed comment WAC 44-14-05004(4)(b)(ii) states that the explanation "should cite the statute the agency claims grant[s] an exemption from disclosure" and "should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper." "One way to properly provide a brief explanation," the comment explains, "is for the agency to provide a withholding index [that] identifies the type of record, its date and number of pages, and the author or recipient of the record." IJ-WA does not believe that this information "properly provides" the "explanation" required by the proposed rules, proposed comments, and RCW 42.17.310(4). Simply citing a statutory exemption and cursorily noting the type, date, page length, author, and recipient of the record withheld or redacted will not ordinarily provide enough information for the requestor to assess the applicability of the claimed exemption. IJ-WA suggests revising the proposed rule and comment to require agencies to provide a brief narrative "explanation of how the exemption applies to the record withheld." RCW 42.17.310(4) (emphasis added); see also *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 270, 884 P.2d 592

MRC - 0075

1/12/2006

(1994) (explaining that RCW 42.17.310(4) prevents “silent withholding” that fails to “provid[e] the required explanation of how the exemption applies to the specific record withheld”). For example, if an agency withholds a record on the ground that it is exempted attorney work product, the agency should be required to provide a brief explanation identifying the “controversy” to which the record relates, as a “controversy” is a prerequisite to the exemption’s applicability. RCW 42.17.310(1)(j). Only with such an explanation can the requestor and reviewing court assess the exemption’s applicability. PUBLICATION OF PROCEDURES Proposed comment WAC 44-14-02001 would require a state agency to “publish its [public records] procedures in the Washington Administrative Code” and a local agency to “prominently display and make them available at each of its offices.” IJ-WA suggests revising this comment to also require state and local agencies to publish their procedures in a readily accessible fashion on their respective websites. PUBLICATION OF PUBLIC RECORDS OFFICER’S NAME AND CONTACT INFORMATION Proposed comment WAC 44-14-02002 would require a state agency to “provide the public records officer’s name and contact information by publishing it in the state register” and a local agency to “publish the public records officer’s name and contact information in a way reasonably calculated to provide notice to the public.” The comment also “encourage[s]” a state agency to provide its public records officer’s contact information on its website and suggests that a local agency do the same. IJ-WA suggests revising this comment to require state and local agencies to publish the name and contact information of their public records officers in a readily accessible fashion on their respective websites. REDUCTION OF ELECTRONIC RECORDS TO PAPER FORMAT Proposed rule WAC 44-14-050(2) allows a public records officer to “provide electronic public records either in an electronic format or by reducing the electronic records to a paper format.” See also proposed comment WAC 44-14-07003. IJ-WA believes that allowing public agencies to satisfy their obligations by providing paper copies of electronic records will not result in full disclosure and openness. Electronic records often contain information or elements (e.g., formulas, linkages) that are not otherwise discernible from paper copies. Thus, allowing agencies to reduce electronic records to paper will deny the public full access to them. CONCLUSION The Public Records Act is essential for the development of transparent government and allows the people to remain fully informed regarding the actions of the people chosen to serve in government. These proposals advance the people’s right to know and the purposes of the Public Records Act. Subject to the revisions outlined above, IJ-WA supports adoption of the proposed rules and comments.